

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL SESSION, 1996

FILED
July 19, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
Appellee,)
)
VS.)
)
JOHNNY WAYNE HARRIS,)
and GARY L. (JAKE) HARRIS)
)
Appellants.)

C.C.A. NO. 03C01-9507-CC-00202

UNICOI COUNTY

HON. LYNN W. BROWN
JUDGE

(Attempted First Degree Murder)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF UNICOI COUNTY

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OPINION FILED _____
AFFIRMED AS MODIFIED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. Johnny Harris was convicted of attempted first degree murder and Jake Harris was convicted of attempted first degree murder by aiding and abetting¹ Johnny Harris. They were convicted by jury in a joint trial. Each defendant was sentenced to twenty-five (25) years as a Range I offender. A fine of fifty thousand dollars (\$50,000.00), as set by the jury, was also imposed. We affirm but modify in part the judgment of the trial court.

In November of 1992, the victim and the defendants were at a party. The two Defendants are brothers and the victim is their cousin. They had all been drinking. The men got into a shouting match at the party. When the victim attempted to leave the party, both Defendants followed him outside and Johnny Harris shot him in the area around his groin, hip and front thigh. The victim was found several hours later in the street. He almost bled to death.

The Defendants argue two issues in this appeal. They first argue that the evidence was not sufficient to support their convictions. Their second argument is that the trial court erred in weighing the enhancing and mitigating factors and imposed an excessive sentence.

I.

¹Although the aiding and abetting language was used at trial and in the briefs on appeal, we point out that it is no longer the proper language. Aiding and abetting is now known as criminal responsibility for the conduct of another as found at Tennessee Code Annotated § 39-11-

The Defendants' first issue is the sufficiency of the evidence. When an accused challenges the sufficiency of the convicting evidence, this court must review the record to determine if the evidence adduced during the trial was sufficient "to support the findings by the trier of fact of guilt beyond a reasonable doubt." T.R.A.P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (Tenn. 1956). This court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Herrod, 754 S.W.2d 627, 632 (Tenn. Crim. App. 1988).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). In State v. Grace, 493 S.W.2d 474 (Tenn. 1973), the Tennessee Supreme Court said, "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." Id. at 476.

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, id., the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record and the inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the accused guilty beyond a reasonable doubt. Matthews, 805 S.W.2d at 780.

There was ample evidence to support the Defendants' convictions. The officer who investigated the incident arrived at the scene a few hours after the ambulance had taken the victim to the hospital. The officer testified that there was a large amount of blood at the scene. He found a bullet lodged in a garage door that was near where the victim had been shot. He surmised that the bullet had recently been lodged in the door because of the presence of splinters. He testified that he spoke with several individuals who had been at the party, and this led him to suspect the two Defendants. He testified that he did not arrest the Defendants until after he spoke with the victim.

The police officer who first arrived on the scene testified that he found the victim "all balled up and moaning." The officer stated that the victim was in a life-threatening situation and was unresponsive. He testified about the amount of blood that was at the scene, as well as the position of the victim when he was found laying in the road. He stated that there was no weapon at the scene.

The victim also testified at the trial. He testified that he had been drinking with the Defendants and some other individuals at a VFW club. One of the men in the group, Mr. Foster, asked if they wanted to go to his house to drink. The victim left with Mr. Foster. The Defendants were not with them. Mr. Foster gave the victim a screwdriver as a gift while they were at Mr. Foster's house. They then proceeded to a party held at a friend's mobile home. The Defendants were at this party. Soon after the victim arrived, one of the Defendants, Johnny Harris, began to yell at him for "snitching" on the Defendants' mother. Several words were exchanged.

The other Defendant, Jake Harris, took the victim outside to talk to him about the situation. The victim testified that he understood that Jake Harris wanted to "settle" the argument by talking to his brother. While they were outside, Jake Harris asked the victim if he had any weapons. The victim replied that he did not and that Jake Harris could search him if he did not believe him. Jake Harris searched the victim and found the screwdriver that Mr. Foster had given to him. Jake Harris asked if he could have the screwdriver. The victim said that he could have it as long as he got it back before he left the party.

The two men returned to the party. When they got inside, Johnny Harris, the other Defendant, stood up and berated the victim. Two women at the party attempted to restrain him. The victim decided to leave the party because of the altercation. The victim walked outside. When he was several steps away from the porch, he turned around and saw the Defendants. The victim attempted to go around the trailer to get away from the Defendants, but he ran into a building

that was next to the trailer. They followed him and they were about ten or twelve feet away from the victim and about six or eight feet away from each other.

At this point, Johnny Harris asked the victim, "Where's your gun?" The victim testified that he replied, "I ain't got no gun. I don't need no gun." The victim said he then turned around to face the Defendants. Then Johnny Harris said, "Well, I've got mine, " and shot the victim. The victim testified that he was still conscious and attempted to get up, but was unable to do so. He stated that the two Defendants then walked over to him and Jake Harris told Johnny Harris to "Finish it." Johnny Harris had the gun pointed directly in the victim's face. The victim said he looked Johnny Harris "dead in the eye" and the Defendant lowered the gun. Jake Harris then said, "I said kill him." Johnny Harris again pointed the gun at the victim's face, and then lowered the gun again. Jake Harris then said, "I told you to kill the son of a bitch." Johnny raised the gun and then dropped it. The victim stated that the voices became faint and the next thing he remembers he was in the hospital.

Mr. Foster also testified at the trial. He stated that he had been drinking with the victim most of the night. He stated that when they were at his house he gave the victim a screwdriver. He testified that he left during the party at the mobile home to take a friend home. He stated that when he returned, the Defendants and the victim were arguing about the victim "ratting on" their mother. He said that when the victim and the Defendants went out the front door, he went out the back door because he did not want to get involved. He testified that when he got to his car he heard a noise like a gun shot towards the front of the mobile home. He stated that he then got in his car and left.

A ballistics expert testified that he had examined the bullet found in the garage door. He stated that the bullet was a .44 caliber bullet. He stated that a .44 caliber weapon would be very loud when fired.

Another witness had been in jail with the Defendants. He stated that he heard Johnny Harris say that he wished he had killed the victim, and that the victim had "ratted on" his mother. This witness stated that he did not expect to get leniency, because he was in jail for a probation violation, and was getting ready to go to rehab. The witness testified that he did not receive any leniency for his testimony at trial.

The deposition of a witness was read into evidence at trial because the witness was deceased. The witness lived next door to the mobile home where the party took place. This witness testified that he was awakened by a loud noise and went to look out a window where he could see the front of the mobile home. He stated that he heard a male voice say, "kill the son of a bitch." He testified that he did not hear a gunshot and did not know what had woken him up.

The doctor who treated the victim also testified. He stated that the victim had lost around sixty (60) to seventy (70) percent of his blood. He also stated that if the victim had been brought in an hour later he probably would have been dead. He testified that a major artery had been cut by the bullet.

Johnny Harris presented a witness at trial. This witness testified that she had attended the party at the mobile home and stated that she was highly intoxicated and did not remember much. She said that she did not know the

Defendants the night of the party, but knew them at the time of the trial. She also said that she had not seen the victim until the day of trial. She stated that she did not hear a gunshot that night, but stated it was probably because she was so intoxicated and she had probably passed out.

The defense then attempted to put on two witnesses. One witness was not allowed to testify because his testimony was to be totally hearsay. The other witness was prevented from testifying because allowing the testimony would have been a breach of "the rule."² Another defense witness was examined outside the hearing of the jury and not permitted to testify in front of the jury because her testimony was not relevant to the issues in the trial. At this point both Defendants rested.

We conclude that any rational trier of fact could have found these Defendants guilty of attempted first degree murder based on the evidence presented at trial.

Therefore, this issue has no merit.

II.

The Defendants' second issue is that the trial court erred in its weighing of the applicable enhancement and mitigating factors and gave the Defendants an excessive sentence. When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo

²Tenn. R. Evid. 615.

review of the sentence with a presumption the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

There were no mitigating factors found for either Defendant. The trial court first sentenced Johnny Wayne Harris, the Defendant who actually shot the victim. The enhancement factors applied were: (1) That the Defendant had a previous history of criminal convictions and criminal behavior in addition to those

necessary to establish the range, Tenn. Code Ann. § 40-35-114(1); (2) that the Defendant acted as a leader in the offense, Tenn. Code Ann. § 40-35-114(2); (3) that the Defendant treated the victim with exceptional cruelty, Tenn. Code Ann. § 40-35-114(5); (4) that the personal injuries inflicted upon the victim were particularly great, Tenn. Code Ann. § 40-35-114(6); and (5) that the Defendant employed a firearm in the commission of the offense, Tenn. Code Ann. § 40-35-114(9). For the sentencing of Jake Harris, the trial court found the identical enhancement factors as for Johnny Harris.

We agree with the trial court that there are no mitigating factors applicable to either Defendant. The first enhancement factor concerning additional criminal convictions and behavior clearly applies to each defendant. The second enhancement factor concerning being a leader during the offense was applied by the trial court because each of the defendants was a leader at some point, Johnny Harris in shooting the victim and Jake Harris in urging Johnny to kill the victim. Each of two criminal actors may be a leader at some time during an offense. State v. Hicks, 868 S.W.2d 729, 731 (Tenn. Crim. App. 1993).

The third enhancement factor regarding the treatment of the victim with exceptional cruelty is also applicable. After the victim was shot and was unable to get up, Jake urged Johnny to kill the victim. This is urged repeatedly and the gun is pointed directly at the victim's face. The two Defendants then left the victim to bleed to a likely death in a ditch on a cool night at the end of November. We conclude that such actions constitute exceptional cruelty. The fourth enhancement factor, the serious personal injury to the victim, is also clearly

applicable to both Defendants. The victim had to undergo surgery to remove part of a vein from one leg to repair the torn artery.

We must disagree with the trial court that the use of a firearm applies to enhance the sentence of Jake Harris. While there is no question that it applies to Johnny Harris, the trial court applied this enhancement factor to Jake Harris because he aided and abetted the actions of Johnny who used the firearm. There is no evidence to connect the firearm to Jake Harris, and we cannot conclude that this enhancement factor can be applied vicariously under the facts presented. While we agree that Jake Harris was guilty of aiding and abetting Johnny Harris, it cannot be said that he “possessed or employed a firearm.”

Therefore, all of the enhancement factors applied to the sentence of Johnny Harris were properly applied. Four out of five enhancement factors applied to the sentence of Jake Harris were appropriate.

Attempted first degree murder is a Class A felony. Tenn. Code Ann. § 39-11-117(2). The range of punishment for a Class A felony in Range I is fifteen (15) to twenty-five (25) years. We conclude that because there are no mitigating factors, Johnny Harris has been properly sentenced to the maximum in the Range, twenty-five (25) years. Because one enhancement factor applied by the trial court to Jake Harris' sentence was improperly applied, we feel compelled to modify his sentence to twenty-three (23) years.

We affirm in part and modify in part the judgment of the trial court. We remand this case solely for the purpose of entering a new sentencing order for Jake Harris.

DAVID H. WELLES, JUDGE

CONCUR:

GARY R. WADE, JUDGE

WILLIAM M. BARKER, JUDGE